Sirena had what appeared to be red "ketchup" stains on his shirt and pants; that Sirena falsely told the police that he had not been at the Popeye's that night (even though the Commonwealth's own witnesses and others placed him there); that Sirena gave the police three conflicting stories about where he was coming from; and that another witness reported seeing Sirena cock a baseball bat to strike Merry.

But the Commonwealth failed to turn over those reports—which placed Sirena near the crime scene just after the murder with red stains on his clothes and offering false and conflicting alibis—to the defense before trial. Likewise, the Commonwealth failed to advise petitioner of his right, under Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100–101, to communicate with his consulate. The Honduran Consulate has submitted a declaration stating that, had it been consulted and advised of petitioner's defense—that another Honduran national had committed the crime—at the very least it would have: (a) supplied immigration records proving that Sirena entered Honduras the day after Merry died; (b) provided a photograph of Sirena; and (c) attempted to contact and interview Sirena to assist petitioner.

The United States has conceded that petitioner's Vienna Convention rights were violated and has issued an apology to Honduras. Notwithstanding the conceded violation and the significant evidence that Sirena rather than petitioner killed Merry, Virginia courts refused to consider petitioner's Vienna Convention claim. That refusal conflicts with the International Court of Justice's decision in *Case Concerning Avena and Other Mexican Nationals (Mex.* v. *U.S.)*, 2004 I.C.J. 128 (Mar. 31), which held that Article 36 creates individually enforceable rights and obligates signatories to adjudicate Article 36 violations despite possible procedural defaults. The Virginia courts also ignored a substantial violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), based on inadequate grounds.

I. Statutory Framework

The Vienna Convention is a "multilateral treaty that governs the establishment of consular relations between nations and defines the function of a consulate." *United States* v. *Emuegbunam*, 268 F.3d 377, 388 (6th Cir. 2001). Under Article 36 of the Vienna Convention, a signatory nation that detains a foreign national must promptly inform the foreign national's consulate of the detention upon the detainee's request:

> [I]f [the detained foreign national] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay.

Vienna Convention, art. 36(1)(b), 21 U.S.T. at 101.

In addition, Article 36 specifically requires signatory nations *to advise* detained foreign nationals of their rights under the Vienna Convention. The detaining State must "inform the person concerned without delay of his rights under this sub-paragraph." Vienna Convention, art. 36(1)(b), 21 U.S.T. at 101. And signatories must ensure that their laws and regulations "enable full effect to be given to the purposes for which the rights accorded under this Article are intended." *Id.*, art. 36(2), 21 U.S.T. at 101.

In 1969, the United States became a party to the Vienna Convention. See 115 Cong. Rec. 30,997 (1969). At the same time, it ratified the Optional Protocol Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325. In ratifying the Optional Protocol, the United States agreed to submit any disputes regarding the "interpretation or application of the Convention" to the International Court of Justice ("ICJ") for resolution. *Id.* art. I, 21 U.S.T.

at 326. On March 7, 2005, the United States withdrew from the Optional Protocol. *Medellín* v. *Dretke*, 125 S. Ct. 2088, 2101 (2005) (O'Connor, J., dissenting) (citing Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (Mar. 7, 2005)).

II. Proceedings In This Case

A. The Murder Trial And Direct Review

There is no dispute that someone brutally killed James Merry by striking him in the head with a baseball bat as he smoked a cigarette outside the Popeye's restaurant in Springfield, Virginia, on the evening of December 10, 1997. The only dispute is who did it. The Commonwealth has accused petitioner, a Honduran national. Petitioner insists that another Honduran national—a man known as "Sirena," whose real name is Julio Osorto—killed Merry.

There was no physical evidence connecting petitioner to the crime. The Commonwealth's first-degree murder case against petitioner was based solely on the testimony of three eyewitnesses who claimed that they saw the attack from within the Popeye's restaurant. They identified petitioner as the assailant, relying in part on their recollections that the attacker wore a red shirt and that petitioner was wearing a red shirt. 3/17/98 Tr. at 131–132, 224–225; 3/18/98 Tr. at 36. They admitted, however, that the attack lasted only seconds and that, although the attack occurred outside the restaurant after dark, their observations were made from within the brightly lit restaurant, through a glass window that was partially obstructed by the advertising poster against which Merry was leaning. 3/17/98 Tr. at 127–128, 131, 142, 156–157, 161, 222, 241–242, 249, 251; 3/18/98 Tr. at 20, 24–25, 27–28, 30. The Commonwealth also presented the testimony of Detective Richard Cline, who said that none of the witnesses he interviewed during his investigation of the murder identified anyone other than petitioner as the attacker. 3/18/98 Tr. at 69.

Petitioner presented the testimony of two eyewitnesses who were standing near Merry outside the restaurant when the attack occurred. Amilcar Amaya testified that he was just leaving Popeye's when he saw a man he knew as "Sirena" approach Merry, take out a baseball bat, and strike him in the head. 3/18/98 Tr. at 100–101. Christina Hondoy testified that, shortly before the attack, she had stepped out of the Popeye's with a friend (Yahayra Quieroloa) to smoke a cigarette. *Id.* at 141–142. She had just turned to say something to Merry, who was standing steps away, when she saw someone strike him in the head with a baseball bat. *Id.* at 142. She did not know who had assaulted Merry, but she stated unequivocally that she knew that it was not petitioner. *Ibid.*

Another witness, Ulma Martinez, testified that she saw Sirena on a flight to Honduras the day after Merry died. 3/18/98 Tr. at 167–168. On cross-examination, Martinez admitted that she did not know Sirena's last name. *Ibid.* Two of petitioner's high school teachers testified that petitioner's demeanor on the day after the assault was inconsistent with that of a person who had brutally assaulted someone the night before. *Id.* at 115–118, 132–135.

In closing argument, the Commonwealth urged that there was no credible evidence that Sirena, rather than petitioner, had committed the murder, 3/19/98 Tr. at 18, 75, 76, despite the fact that one of its own witnesses placed Sirena at the Popeye's at the time of the attack, 3/17/98 Tr. at 129. The Commonwealth dismissed Amilcar Amaya as a "gang member," 3/19/98 Tr. at 19–20, and argued that Hondoy had been given loans by the Bustillo family, *id.* at 22–23. The "whole Sirena thing," the Commonwealth urged, was "very convenient" because "Sirena apparently isn't available." *Id.* at 20. The Commonwealth even cast doubt on whether "this so-called Sirena" existed, pointing out that neither Amilcar Amaya (who testified that he saw Sirena strike Merry), nor Ulma Martinez (whom the

Commonwealth characterized as "supposedly" having seen Sirena flee to Honduras the day after Merry's death) actually "kn[e]w his full name." *Id.* at 20, 75. And the Commonwealth pointed out that no one had produced "plane tickets * * * for this Sirena." *Id.* at 20–21, 75.

But the jury (like the defense) was not told that the police in fact had stopped Sirena in the area of the crime scene shortly after the assault. The jury (like the defense) was not told that Sirena, when stopped, gave false and inconsistent explanations of where he was coming from. The jury (like the defense) was not told that the officers observed red stains on Sirena's pants and shirt. And the jury (like the defense) was never told that official Honduran immigration documents confirmed that Sirena—Julio Osorto—in fact had fled to Honduras on the flight identified by Ulma Martinez. Finally, although the police knew petitioner was a Honduran national when they detained him, at no point was petitioner advised of his right to contact the Honduran Consulate.

The jury returned a verdict of guilty, 3/19/98 Tr. at 83, and sentenced petitioner to 30 years' imprisonment, 3/20/98 Tr. at 24. While petitioner's appeal to the Virginia Court of Appeals was pending, petitioner received a declaration from the Honduran Consulate stating that it had not been informed of the charges against petitioner and that, had it been so informed, it would have provided him with assistance. Habeas Pet. Exh. 8. Petitioner moved to remand the case to the trial court because, *inter alia*, the Commonwealth had violated his Vienna Convention rights by failing to inform him of his rights under that treaty. The court denied the motion, *Bustillo* v. *Commonwealth*, Nos. 2321-98-4 and 2422-98-4, at 13–14 (Va. Ct. App. June 1, 1999), and affirmed the conviction, *Bustillo* v. *Commonwealth*, Nos. 2321-98-4, 2422-98-4, 2000 WL 365930 at *3, (Va. Ct. App. Apr. 11, 2000). The Supreme Court of Virginia denied the petition for appeal, *Bustillo* v. *Com-*

monwealth, No. 001110, slip op. at 1 (Va. Jan. 17, 2001), and this Court denied further review, *Bustillo* v. *Virginia*, 532 U.S. 1072 (2001).

B. Proceedings On State Habeas

Petitioner sought a writ of habeas corpus in the Circuit Court for Fairfax County based on newly discovered evidence, violations of the duty to disclose exculpatory evidence under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and a violation of Article 36 of the Vienna Convention.

1. *The New Evidence And Vienna Convention Claims.* The new evidence consisted of, among other things, a surreptitiously recorded videotape in which Sirena admitted killing Merry. See Habeas Pet., Exh. 9, at 3–4. On the tape, another Honduran national (working in connection with petitioner's new counsel) recorded Sirena bragging about the killing to his friends. The description was nothing short of brutal: "When I smashed [Merry] with that blow * * * I heard that son of a bitch sound like a big box." *Id.* at 6. Consistent with the witness testimony, Sirena specified that he attacked Merry with a baseball bat while Merry was outside the Popeye's smoking a cigarette. *Id.* at 4. Consistent with testimony that the attacker was wearing red, Sirena stated that he had been wearing a red sweater. *Id.* at 7. Sirena also stated that, after striking Merry, he hid out in a field, where he drank a six-pack of beer. *Id.* at 6–7.

The habeas petition included a copy of the videotaped confession, together with the affidavits of four different eyewitnesses who swore that, upon viewing the videotape, they "recognized the individual facing the camera" (Sirena) as the person they saw "committing the December 10, 1997, assault" on Merry. Habeas Pet. Exhs. 11–14. It also included sworn affidavits by several witnesses who, based on a photograph of Sirena produced by the Honduran Consulate, identified Sirena as the attacker; several explained that they had not come forward earlier because they feared being deported. See *id.*, Exhs. 16, 21, 28, 29, 32.

Petitioner also asserted that his conviction was obtained in violation of Article 36 of the Vienna Convention. He swore that, if he had been advised of his right to contact the Honduran Consulate, he would have done so. Habeas Pet. Exhs. 7, 14b. The Honduran Consulate in turn executed an affidavit declaring that, had it been apprised of the case, it would have (at a minimum) confirmed Julio Osorto/Sirena's existence and nationality, provided official records of his arrival in Honduras just after Merry's death, attempted to interview Sirena, and provided the defense with Sirena's picture. See *id.*, Exh. 26.

On August 8, 2002, the Circuit Court denied petitioner's new evidence and Vienna Convention claims. With respect to the new evidence claims, the Circuit Court held that newly discovered evidence is not a ground for habeas relief. App., *infra*, 41a. With respect to the Vienna Convention claim, the court held that it was procedurally defaulted because petitioner did not raise it at trial. *Id.* at 47a.

2. *The* Brady *claim.* Petitioner also alleged that the prosecution had unlawfully withheld exculpatory evidence in violation of *Brady*. Although the Circuit Court initially denied those claims, App., *infra*, 37a, the court eventually reconsidered and granted petitioner's motion to compel production of the Commonwealth's investigation files and all information about Sirena. In response, the Commonwealth for the first time disclosed the police report of Officer Christopher Mahoney and the investigation notes of Detective Richard Cline.

a. The Mahoney Report revealed that Officer Mahoney stopped "Julio C. Osorto," now known to be Sirena, while canvassing the crime scene hours after the fatal assault. Report of Officer Christopher Mahoney, Dec. 10, 1997, at 1. According to the Mahoney Report, Sirena "had what appeared to be ketchup" on his shirt and pants. *Ibid.* The Report also indicated that Sirena gave conflicting statements about where he was coming from:

> [Mr. Osorto] claimed he had come from McDonald's * * *. Mr. Osorto originally stated he was coming from his cousin[']s residence on Cumberland Ave., then he stated he was coming from Commerce St. * * *. He stated he lived at Chelse[a] Square Apts. but was confused on the address.

Id. at 1–2. When asked whether he had been at Popeye's that evening, Sirena "stated he was not at Popeye[']s." *Id.* at 1. Sirena's breath smelled of alcohol. *Id.* at 1–2.

Detective Cline's investigation notes recorded that one witness placed "Julio – Sirena" at the crime scene. Notes of Detective Richard Cline, Dec. 18, 1997, at 1. Detective Cline's notes also revealed that, when he interviewed Jose Amaya several weeks after the attack, Amaya indicated that he saw both Sirena and petitioner at the Popeye's that evening and that, although he "[c]ouldn't tell ~~who~~ actually hit the guy," he "[s]aw Sirena take bat from [his] shirt" and "cock it" as he approached Merry. Notes of Detective Richard Cline, Jan. 7, 1998, at 3. Amaya said that Sirena had left the country for Honduras after the crime. *Id.* at 4.

b. After a hearing, the Circuit Court concluded that Officer Mahoney's report and Detective Cline's notes were clearly exculpatory and should have been disclosed to the defense before trial. Those documents, the court explained, "unquestionably implicate 'Sirena' * * * as a possible suspect," and thus "must be deemed exculpatory" within the meaning of *Brady*. App., *infra*, 27a, 28a. Although the Commonwealth had disclosed information in Detective Cline's notes that was favorable to the prosecution, it inexplicably "failed to disclose that [Jose] Amaya also told Detective Cline that he observed Sirena holding a bat in a cocked position. This latter piece of information not only makes clear that Sirena was present at the scene, but also implicates Sirena as the actual assailant." *Id.* at 27a.

The Circuit Court further held that the Mahoney Report also implicated Sirena rather than petitioner as the

assailant: The fact that "an individual named Julio Osorto was stopped by an officer on the night of the assault near the crime scene with red stains on his clothing must be deemed exculpatory." App., *infra*, 28a. Although the blow to Merry's head produced a "closed head wound" (*i.e.*, it did not break the skin), and no blood was found on petitioner or the baseball bats recovered near the scene, the Circuit Court concluded that the red stains were relevant because "photographs of the crime scene depict[] what appears to be blood spatter." *Ibid.*; see *id.* at 24a–25a ("[T]he Commonwealth was certainly aware that Merry's blood was found at the scene * * *."). Because of that, and in light of "testimony identifying 'Sirena-Julio' as the assailant," the Circuit Court found that "the stopping of a 'Julio' near the crime scene at the time of the incident with red stains on his clothes[] is exculpatory in nature warranting its production to the defense prior to trial." *Id.* at 28a–29a.

c. The Circuit Court ordered a "limited hearing" to determine whether the improperly withheld *Brady* evidence was "material," App., *infra*, 34a, *i.e.*, whether "there is a reasonable probability that," but for the nondisclosure, "the factfinder would have had a reasonable doubt respecting guilt," *id.* at 29a–30a (quoting *Strickland* v. *Washington*, 466 U.S. 668, 695 (1984)). At that hearing, petitioner's original trial counsel testified that he was "shocked" to learn of Detective Cline's notes and the Mahoney Report. *Id.* at 12a. He testified that, had he been presented with the Mahoney Report, he likely would have called Officer Mahoney to testify regarding his encounter with Sirena in order to bolster the defense's contention that Sirena was the assailant. *Id.* at 12a–13a. Moreover, because of the Commonwealth's "several references" at trial "to the fact that the defense called only one witness in support of its position that Sirena, not Bustillo, was the assailant," trial counsel "testified that this corroboration would have 'enhanced' the defense's position." *Id.* at 13a n.39. See also

id. at 12a n.38 (noting the difficulty of proving Sirena's existence and "presence at the Popeye's Restaurant the night Merry was attacked").

In response to the Circuit Court's apparent concern that the red stains on Sirena's clothing might be inconsistent with the fact that Merry suffered a "closed" head wound, petitioner presented the testimony of Dr. Peter Bernad, a licensed neurologist. Dr. Bernad testified that traumatic blows to the head like the one Merry had suffered can often cause blood to "aerate" (*i.e.*, to spray) "from the ear immediately upon impact." App., *infra*, 9a; see *id.* at 9a–10a (noting "Dr. Bernad's testimony that blood would have 'sprayed/aerated' from the victim's ear at some point upon or almost immediately after impact"). Two eyewitnesses to the attack, Yahayra Quieroloa and Amilcar Amaya, testified at the hearing that they saw blood spray when Merry was struck. *Id.* at 10a, 11a.

Following the hearing, the Circuit Court ruled that the suppressed evidence was not material. The court stated that, on habeas review, it "cannot consider or evaluate the weight or credibility of the evidence presented to the jury" at the original trial. App., *infra*, 15a. At the same time, the court downplayed the importance of both the red stains on Sirena's shirt and pants and the expert testimony that blood aerated from Merry's ear on impact. According to the court, "the crime scene photos revealed no signs of blood 'spray,' 'spatter' or droplets, but rather only a few sizable drops of blood * * * the Court finds consistent with blood seepage, not blood spatter." *Id.* at 10a. The court also disregarded Yahayra Quieroloa and Amilcar Amaya's testimony that they saw blood fly when Merry was struck. *Id.* at 10a, 11a. The court did not address the fact that Sirena lied to the police about having been at the Popeye's that night or his inconsistent statements. Finally, the Circuit Court relied heavily on the testimony of petitioner's trial counsel, who stated that he could not be certain that

disclosure of the *Brady* evidence would have altered the trial's outcome. *Id.* at 14a. The court deemed that testimony "instrumental" to its decision. *Ibid.*

C. The Supreme Court Of Virginia's Decision

In a one-page order, the Supreme Court of Virginia denied petitioner's petition for appeal. With respect to the Vienna Convention claim, the court stated that it was "of [the] opinion there is no reversible error in the judgment complained of * * * ." App., *infra*, 1a.

The Supreme Court of Virginia likewise denied review of the *Brady* claims. In advance of the ruling, the Commonwealth had moved to dismiss those claims because a transcript of a habeas hearing had been filed late in the trial court. (Although one reason the transcript was filed late was the court reporter's failure to meet a promised deadline, the court refused a request to permit late filing. See Motion to File Transcript Out of Time at 2.) Petitioner responded that, because his challenges were strictly legal in nature, the habeas court had made extensive factual findings upon which to base appellate review, and there were no challenges to those findings, the habeas hearing transcripts were unnecessary.

The Supreme Court of Virginia ruled that the appeal "was not perfected in the manner provided by law." App. *infra*, 1a. The court cited no authority. Nor did it address numerous Virginia decisions holding that such transcripts are not necessary to adjudicate *Brady* claims.

REASONS FOR GRANTING THE PETITION

This case concerns a conflict between this Nation's state and federal courts and the International Court of Justice ("ICJ") concerning the meaning of, and the obligations imposed by, Article 36 of the Vienna Convention on Consular Relations. In two decisions, the ICJ has held and reiterated that the Vienna Convention requires American courts to adjudicate the claims of foreign nationals asserting that their convictions were obtained in violation of

the Vienna Convention and that the application of procedural-default rules to refuse such review is inconsistent with the Convention's requirements. State and federal courts, in contrast, have reached conflicting results, refusing to hear the claims of foreign nationals asserting Vienna Convention violations and invoking procedural default rules to bar review. There can be little doubt of the issue's importance. This Court recently granted a petition for a writ of certiorari implicating this conflict, *Medellín* v. *Dretke*, 125 S. Ct. 2088 (2005), but ultimately dismissed the petition as improvidently granted in light of changed circumstances relating to that case and potential procedural defects—none of which exists here.

There is no dispute that the Commonwealth of Virginia violated the Vienna Convention when, after arresting petitioner, it failed to advise him of his right to consult with and seek the assistance of the Honduran Consulate. Moreover, it is difficult to imagine circumstances in which the aid of the consulate could be more critical than it was here. The violation denied petitioner access to the assistance of *Honduran officials* in his effort to show that *another Honduran national* who had *fled to Honduras* had committed the offense. Furthermore, it is now known that, shortly after the murder, Virginia police officers encountered that Honduran national—known as Sirena—near the murder scene; that Sirena gave the officers false and conflicting statements of where he was coming from; that the police observed red stains on Sirena's shirt and pants; that Sirena was seen by another witness cocking a bat to strike the victim; that Sirena fled to Honduras the day after the victim died; and that Sirena has since been recorded on videotape bragging that he committed the murder. Because petitioner was deprived of the assistance of Honduran officials, however, petitioner could not even prove that Sirena fled to Honduras, much less obtain the videotaped confession that counsel was able to procure

through informants once Sirena's identity and location were determined. Simply put, the Vienna Convention violations, along with serious violations of *Brady* v. *Maryland*, 373 U.S. 83 (1963), caused petitioner to be convicted and sentenced for an act he did not commit.

I. This Court Should Address The Conflict Concerning The Proper Construction Of Article 36 Of The Vienna Convention

A. United States And International Courts Are In Disarray Over The Interpretation Of Article 36

The United States has been a party to the Vienna Convention for over 30 years. In that time, the decisions of state and federal courts interpreting the Convention have increasingly come to conflict with rulings of the International Court of Justice.

1. Twice in the past five years the ICJ has ruled that the Vienna Convention creates individual rights and that United States courts must adjudicate claimed violations despite procedural defaults. In *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27), the ICJ rejected the contention that individual defendants cannot raise Vienna Convention claims because any rights the Convention creates are the "rights of States, and not of individuals." *Id.* ¶ 76. Invoking "the text of" the Vienna Convention, the ICJ squarely held that Article 36 "creates individual rights." *Id.* ¶ 78. The ICJ further held that the application of procedural default rules in that case violated paragraph 2 of Article 36 by preventing "'full effect [from being] given to the purposes for which the rights accorded under this article are intended.'" *Id.* ¶ 91 (quoting Vienna Convention, art. 36(2), 21 U.S.T. at 101).

Last year, the ICJ reiterated and expanded on its interpretation of Article 36 in *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31). In *Avena*, Mexico argued that the United States had denied 51 Mexican nationals their Vienna Convention

rights. *Id.* ¶ 12. Citing *LaGrand*, the ICJ again held that Article 36 gives detained foreign nationals individually enforceable rights that they can "assert[] within the domestic legal system of the United States." *Id.* ¶ 40. And, as in *LaGrand*, the ICJ held that paragraph 2 of Article 36 prohibited courts from applying procedural default rules to bar consideration of claims under the Vienna Convention. *Id.* ¶ 113. As a remedy for those violations, the ICJ ordered the United States "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences" of the Mexican nationals named in the complaint, without regard to procedural default rules. *Id.* ¶ 153(9).

2. State and federal courts have reached contrary results. Confronted "with numerous claims based upon the Vienna Convention without the benefit of a definitive statement from" this Court, *United States* v. *Emuegbunam*, 268 F.3d 377, 391 (6th Cir. 2001), state and federal "[c]ourts have been unable to reach a consensus" on "whether Article 36 creates an individually enforceable right to consular notification," *United States* v. *Santos*, 235 F.3d 1105, 1107 (8th Cir. 2000) (citations omitted). For example, eight different federal and state courts (including the Supreme Court of Virginia) have, contrary to the ICJ, ruled that Article 36 does not create individual rights—an interpretation that would foreclose individual judicial remedies even on direct review.[1] Typically, those courts have based their decisions on the "general rule" that "international treaties do not create rights that are privately enforceable in the federal courts," as well as language in the

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[1] See *Cardenas* v. *Dretke*, 405 F.3d 244, 253 (5th Cir. 2005); *Emuegbunam*, 268 F.3d at 394; *Gomez* v. *Commonwealth*, 152 S.W.3d 238, 242 (Ky. Ct. App. 2004); *State* v. *Martinez-Rodriguez*, 33 P.3d 267, 274 (N.M. 2001); *State* v. *Sanchez-Llamas*, 108 P.3d 573, 578 (Or. 2005); *Cauthern* v. *State*, 145 S.W.3d 571, 626 (Tenn. Crim. App. 2004); *Shackleford* v. *Commonwealth*, 547 S.E.2d 899, 905 (Va. 2001); *State* v. *Navarro*, 659 N.W.2d 487, 494 (Wis. Ct. App. 2003).

Vienna Convention's preamble discussing its purpose. *Emuegbunam*, 268 F.3d at 389, 391–392.

Many federal district courts (and many court of appeals judges in dissent) have reached the opposite conclusion, agreeing with the ICJ's construction.[2] Those courts have looked to the plain text of Article 36 and concluded that "it is difficult to imagine 'how it is possible to frame language that more unequivocally establishes that the protections of Article 36(1)(b) belong to the individual national, and that the failure to promptly notify him/her of these rights constitutes a violation of these entitlements by the detaining authority.'" *Standt* v. *City of New York*, 153 F. Supp. 2d 417, 425 (S.D.N.Y. 2001) (quoting *United States* v. *Li*, 206 F.3d 56, 72 (1st Cir. 2000) (Torruella, J., concurring and dissenting in part)). Those courts have rejected the claim that the Convention's preamble trumps the plain text of Article 36:

> [I]t appears that the purpose of [the preamble] is not to restrict the individual notification rights of foreign nationals, but to make clear that the Convention's purpose is to ensure the smooth functioning of consular posts in general, not to provide special treatment for individual consular officials.

Standt, 153 F. Supp. 2d at 425.

Even more so than in other contexts, the need for a uniform construction is paramount. "A multilateral treaty is rather like a 'uniform law' within the United States. The Court has an obligation to keep interpretation as uniform as

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[2] See *United States* v. *Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1125 (C.D. Ill. 1999); *United States ex rel. Madej* v. *Schomig*, 223 F. Supp. 2d 968, 979 (N.D. Ill. 2002); *United States* v. *Hongla-Yamache*, 55 F. Supp. 2d 74, 78 (D. Mass. 1999); *Standt* v. *City of New York*, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001); *United States* v. *Superville*, 40 F. Supp. 2d 672, 678 (D.V.I. 1999); *United States* v. *Li*, 206 F.3d 56, 72 (1st Cir. 2000) (Torruella, J., concurring and dissenting in part); *Breard* v. *Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring); *United States* v. *Lombera-Camorlinga*, 206 F.3d 882, 890 (9th Cir. 2000) (Boochever, J., dissenting).

possible." *Block* v. *Compagnie Nationale Air France*, 386 F.2d 323, 337–338 (5th Cir. 1967) (Wisdom, J.). More important, the construction of an international treaty is an issue of international importance—particularly where state courts and the lower federal courts have interpreted the treaty in a manner that conflicts with the construction of international bodies and other signatories.[3]

3. There is also an international conflict on whether United States courts may refuse to remedy Vienna Convention violations where there is a procedural default. Years before *Avena* and *LaGrand* were decided, this Court addressed the issue in *Breard* v. *Greene*, 523 U.S. 371, 375 (1998) (*per curiam*). The Court recognized that it "should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such." *Id.* at 375. Finding no authoritative construction from the ICJ or other international body, the Court interpreted paragraph 2 of Article 36—"which provides that the rights expressed in the

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[3] Still more courts have sidestepped whether Article 36 creates judicially enforceable individual rights. See *United States* v. *Li*, 206 F.3d 56, 60 (1st Cir. 2000) (*en banc*); *United States* v. *De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001); *United States* v. *Lawal*, 231 F.3d 1045, 1048 (7th Cir. 2000); *United States* v. *Santos*, 235 F.3d 1105, 1108 (8th Cir. 2000); *United States* v. *Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000); *United States* v. *Minjares-Alvarez*, 264 F.3d 980, 986 (10th Cir. 2001); *Darby* v. *Hawk-Sawyer*, 405 F.3d 942, 946 (11th Cir. 2005); *Bieregu* v. *Ashcroft*, 259 F. Supp. 2d 342, 353 n.7 (D.N.J. 2003); *People* v. *Preciado-Flores*, 66 P.3d 155, 161 (Colo. Ct. App. 2003); *Conde* v. *State*, 860 So. 2d 930, 953 (Fla. 2003); *Lopez* v. *State*, 558 S.E.2d 698, 700 (Ga. 2002); *People* v. *Hernandez*, 745 N.E.2d 673, 682–683 (Ill. App. Ct. 2001); *Zavala* v. *State*, 739 N.E.2d 135, 140 (Ind. Ct. App. 2000); *State* v. *Buenaventura*, 660 N.W.2d 38, 45 (Iowa 2003); *Commonwealth* v. *Diemer*, 785 N.E.2d 1237, 1244 (Mass. App. Ct. 2003); *Ademodi* v. *State*, 616 N.W.2d 716, 717 (Minn. 2000); *Garcia* v. *State*, 17 P.3d 994, 996 (Nev. 2001); *People* v. *Ortiz*, 795 N.Y.S.2d 182, 183 (N.Y. App. Div. 2005); *State* v. *Issa*, 752 N.E.2d 904, 914–915 (Ohio 2001); *State* v. *Jamison*, 20 P.3d 1010, 1015 (Wash. Ct. App. 2001).

Convention 'shall be exercised in conformity with the laws * * * of the receiving State'"—to allow for the application of state procedural default rules. *Id.* at 375–376 (quoting Vienna Convention, art. 36(2), 21 U.S.T. at 101).

That ruling conflicts with the ICJ's subsequent determinations in *Avena* and *LaGrand* that applying procedural default rules to bar Vienna Convention claims violates Article 36's requirement that "full effect" be given to the Convention's protections. *Avena*, 2004 I.C.J. at ¶ 113; *LaGrand*, 2001 I.C.J. at ¶ 91. Because *Breard* was issued without benefit of those ICJ rulings, it is ripe for reconsideration. "In the past the Court has revisited its interpretation of a treaty when new international law has come to light." *Medellín*, 125 S. Ct. at 2105 (O'Connor, J., dissenting). *Breard*, moreover, is a *per curiam* opinion and was rendered under exigent circumstances without benefit of full briefing and argument. See *Breard*, 523 U.S. at 379–380 (Stevens, J., dissenting); *Torres* v. *Mullin*, 540 U.S. 1035, 1035–1036 (2003) (Stevens, J., respecting denial of certiorari). This Court has "felt less constrained to follow precedent" established under such circumstances. *Hohn* v. *United States*, 524 U.S. 236, 251 (1998).

This Court has the exclusive "prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). The Fifth Circuit, for example, has ruled that it cannot follow *Avena* because doing so would require it to "disregard [this] Court's holding in *Breard* that ordinary default rules can bar [Vienna Convention] claims." *Cardenas* v. *Dretke*, 405 F.3d 244, 253 (5th Cir. 2005). If the courts of this Nation are to "give respectful consideration to the interpretation of an international treaty rendered by an international court," that consideration must come from this Court.

B. The Vienna Convention Issues Have Overwhelming National And International Importance

There is no doubt that the Vienna Convention issues raised here warrant this Court's review. The Court has already granted a petition for a writ of certiorari to resolve closely related questions, see *Medellín* v. *Dretke*, cert. granted, 125 S. Ct. 686 (2004). This Court dismissed the writ as improvidently granted in that case, not because the issues were unworthy of review, but because the case came "freighted with formidable threshold issues that deter definitive answers to the questions presented." 125 S. Ct. at 2095 (Ginsburg, J., concurring). After the Court granted the petition, the President issued a memorandum that could entitle "the 51 Mexican nationals addressed in" the *Avena* decision (including Medellín himself) to relief in state court. Relying on that memorandum, Medellín filed a state habeas action that could "provide [him] with the review and reconsideration of his Vienna Convention claim that" he was seeking from this Court. That new development, together with five different procedural impediments to review arising from the fact that his claim was asserted in federal habeas proceedings, led the Court to dismiss the writ. *Medellín*, 125 S. Ct. at 2090–2092.[4]

None of those threshold issues is present here. This case arises on state rather than federal habeas, so the procedural hurdles related to the latter pose no barrier to review. Further, petitioner is not one of the 51 individuals

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[4] The Court noted that (1) a violation of the Vienna Convention may not be cognizable on federal habeas at all under *Reed* v *Farley*, 512 U.S. 339 (1994); (2) no relief is available in federal habeas unless the prior state adjudication "was contrary to, or an unreasonable application of, clearly established Federal law"; (3) under *Teague* v. *Lane*, 489 U.S. 288 (1989), a federal habeas petitioner generally cannot seek to enforce a "new rule of law"; (4) a habeas petitioner cannot seek further review absent a certificate of appealability, which may be available only for violations of *constitutional* rather that statutory or treaty rights; and (5) Medellín might not have exhausted state remedies.

entitled to relief under the *Avena* judgment and the Presidential memorandum. State habeas proceedings thus do not provide an alternative means of obtaining review of his Vienna Convention claims. In that respect, this case is more important than *Medellín*. *Medellín* arguably focused on whether the ICJ's ruling in *Avena* should be given effect for the limited number of Mexican nationals specifically identified as entitled to relief in the *Avena* judgment.[5] This case, in contrast, involves the much larger number of foreign nationals who are not mentioned in such a judgment, and who therefore must assert their rights under the text of Article 36 itself, as well as principles of comity and the respect due to the ICJ's construction. This case, moreover, specifically presents for review questions underlying and subsumed in the ICJ's judgments in *Avena* and *LaGrand*, namely "whether Article 36(1)(b) of the Convention creates a judicially enforceable individual right; and * * * whether Article 36(2) of the Convention sometimes requires state procedural default rules to be set aside so that the treaty can be given 'full effect.'" *Id.* at 2095 (O'Connor, J., dissenting).

Those questions deserve this Court's consideration. In 2003, our state prisons held more than 56,000 non-United States citizens, and, as of February 2005, 119 noncitizens were on death row. Accordingly, these are "questions that will inevitably recur." 125 S. Ct. at 2096 (O'Connor, J., dissenting). Even a cursory search of the case law reveals that detained foreign nationals regularly assert new Vienna Convention claims. See pp. 16–18 & nn.1-3, *supra*. Resolution of these questions has tremendous diplomatic signi-

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[5] The questions presented in *Medellín* were "whether a federal court is bound by the [ICJ's] ruling that United States courts must reconsider José Medellín's claim for relief under the Vienna Convention on Consular Relations, without regard to procedural default doctrines"; and "whether a federal court should give effect, as a matter of judicial comity and uniform treaty interpretation, to the ICJ's judgment." 125 S. Ct. at 2089.

ficance as well. Sovereign nations have haled the United States into the ICJ alleging violations of the Vienna Convention based on the failure to provide adequate judicial review. See *Avena*, 2004 I.C.J. 128; *LaGrand*, 2001 I.C.J. 104. The case may also have profound consequences for the treatment of United States citizens detained abroad, because foreign nations may refuse to apply the Vienna Convention more broadly for United States citizens detained within their borders than the United States applies it for foreign nationals detained within the United States. The need for a definitive interpretation of Article 36 thus is no less pressing now than it was when the Court granted the petition in *Medellín*, and this case provides an ideal vehicle, "shorn of procedural hindrances," 125 S. Ct. 2093 (Ginsburg, J. concurring), for addressing the matter.

C. Petitioner Was Severely Prejudiced By The Violation Of His Vienna Convention Rights

The violation of the Vienna Convention here deprived petitioner of crucial evidence corroborating that Sirena—not petitioner—killed James Merry. It was, after all, Sirena whom the police found near the crime scene shortly after the crime, with red stains on his shirt and pants; it was Sirena who, after being stopped, gave the police false and inconsistent statements about where he was coming from; it was Sirena who fled to Honduras the day after Merry died; and it was Sirena who later bragged to friends about having committed the murder—describing it in graphic detail—in a secretly videotaped conversation.

It is hard to imagine a case where the denial of consular assistance could be more prejudicial. Petitioner's defense was not merely that he, a Honduran national, did not commit the crime. It was that *another Honduran national*, Sirena, committed the crime and that Sirena had fled *to Honduras* the day after the victim died. Sirena's flight, if proven, itself would have been powerful evidence of Sirena's guilt and petitioner's innocence. See *California* v. *Hodari*

D., 499 U.S. 621, 624 n.1 (1991) (The guilty "flee when no man pursueth.") (quoting Proverbs 28:1); *Illinois* v. *Wardlow*, 528 U.S. 119, 124 (2000) ("Headlong flight * * * is the consummate act of evasion" that is "suggestive" of "wrongdoing"). It is in precisely such circumstances that consular officials, with their unique access to immigration records and law enforcement officers to find and interview suspects within their Nation's borders, are most useful.

Here, for example, the defense had great "difficulty finding evidence to corroborate the existence of" a Honduran national "named 'Sirena.'" App., *infra*, 12a n.38. Exploiting that, the prosecution suggested to the jury that Sirena was a convenient defense fabrication. The Commonwealth's closing argument referred to "this so-called Sirena"; pointed out that no one seemed even to know his last name; and repeatedly called him and his unavailability "convenient." 3/19/98 Tr. at 20–21, 75. The prosecution likewise dismissed Ulma Martinez's testimony that she saw Sirena on a flight to Honduras the day after Merry died, asserting that "[s]he still doesn't know [Sirena's] full name"; that "[t]he plane tickets you have are for that witness, not for this Sirena"; and casting doubt on whether the "so-called Sirena" "was on the plane" at all. *Ibid.*

Had the Commonwealth apprised petitioner of his Vienna Convention rights, those arguments—virtually the entirety of the Commonwealth's response to the Sirena defense—would have been unavailable. The Government of Honduras has represented that, had it been advised of the case, it at least would have been able to provide biographical data and a picture of Sirena as well as official documents confirming that Sirena entered Honduras just after Merry died. Habeas Pet. Exhs. 26, 26a, 26b.[6] That would have

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[6] The Commonwealth has never disputed petitioner's sworn statement that, had he been informed of his rights, he would have requested to speak with consular officials. See Habeas Pet. Exhs. 7, 14b. Nor has the

dramatically altered the course of trial. It would have precluded any suggestion that Sirena was a convenient defense invention, for he would be a real person with a picture and biographical data. It would have precluded the Commonwealth's effort to suggest that Sirena's suspicious and sudden departure was fiction, for it would have shown that he had fled to Honduras the day after Merry died, precisely as Ulma Martinez had testified. And it likely would have led to still further information implicating Sirena and exculpating petitioner. When the police interviewed witnesses, none of them was shown Sirena's photo; they were shown only petitioner's. But when confronted with the photo of Sirena later provided by the Honduran government, several witnesses identified Sirena as the individual who struck Merry. *Id.*, Exhs. 16, 21, 28, 29, 32.

Honduras has also represented that it would have attempted to locate Sirena and interview him. Habeas Pet. Exh. 8, at 3. The potential impact of such an effort should not be underestimated. Acting with fewer resources and no law enforcement experience, petitioner's habeas counsel ultimately was able to locate Sirena in Honduras and convince an associate of Sirena's to surreptitiously videotape conversations with Sirena—conversations in which Sirena confessed to Merry's killing with self-authenticating detail. Consistent with the witness testimony, Sirena stated that he attacked Merry with a baseball bat while Merry was outside the Popeye's smoking a cigarette. *Id.*, Exh. 9, at 4. Consistent with testimony that the attacker was wearing red, Sirena stated that he had been wearing a red sweater. *Id.* at 3, 7. And, consistent with the Mahoney Report's statement that Sirena had alcohol on his breath when stopped by police, Sirena stated that, after striking Merry, he hid out in a field, where he drank a six-pack of beer. *Id.* at 6–7. That lattermost assertion is particularly striking

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Commonwealth disputed the statements of Honduran officials that they could have provided significant assistance. *Id.*, Exhs. 8, 26.

because, at the time of Sirena's confession, the Mahoney Report—and its statement that Sirena's breath smelled of alcohol—had not yet been disclosed. Better self-authenticating detail is difficult to imagine.

Consequently, this is not a case in which the claimant is unable to identify potential prejudice from a violation of the Vienna Convention. Contrast *Medellín*, 125 S. Ct. at 2091; *Breard*, 523 U.S. at 377. Nor is this a case where the defendant seeks to exclude evidence of his guilt to remedy the alleged violation. See, *e.g.*, *Santos*, 235 F.3d at 1108. Rather, Virginia's failure to observe petitioner's Vienna Convention rights deprived him of evidence that not only raises reasonable doubt about his guilt, but also strongly supports his innocence.

II. The Virginia Courts' Denial Of Petitioner's *Brady* Claims Warrants Review

A. The Circuit Court's Ruling On Materiality Contravenes This Court's Precedents

It is well established that exculpatory evidence is material under *Brady* if "there is a reasonable probability that the result of the trial would have been different if the suppressed [evidence] had been disclosed to the defense." *Strickler* v. *Greene*, 527 U.S. 263, 289 (1999) (internal quotation marks omitted); see *Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995). Consequently, if there is a reasonable probability that the suppressed material would have raised a reasonable doubt in the mind of even a single juror, reversal is required. See *United States* v. *Bagley*, 473 U.S. 667, 678 (1985). There can be no dispute that the Mahoney Report and Detective Cline's notes meet that standard.

The sole issue before the jury at trial was whether petitioner or "Sirena" killed James Merry. Four years after the trial, the Commonwealth disclosed a police report revealing that an officer stopped and interviewed the person now known to be Sirena near the crime scene on the night of the attack; that the officer observed "what

appeared to be ketchup" on Sirena's pants and shirt; and that Sirena gave false and inconsistent accounts of where he was coming from and where he had been. Report of Officer Christopher Mahoney, Dec. 10, 1997, at 1–2. Around the same time, the Commonwealth disclosed a detective's notes indicating that an eyewitness to the murder saw Sirena at the crime scene approaching the victim with a "cock[ed]" bat, and further indicated that Sirena had left the country. Notes of Detective Richard Cline, Jan. 7, 1998, at 3.

Particularly in the context of a trial rife with conflicting eyewitness testimony—and with serious potential for witnesses to confuse one Honduran national for another—that evidence would have provided crucial corroboration for petitioner's defense. Indeed, it would have wholly eliminated the prosecution's repeated suggestions to the jury that the "so-called" alternative suspect (Sirena) was a "convenient" defense contrivance. 3/19/98 Tr. at 20–21, 75. Even setting aside the red stains on Sirena's clothes (and the absence of any stains on petitioner's clothes), the fact that Sirena gave false and conflicting statements to the police is particularly powerful evidence of his guilt and petitioner's innocence. See *United States* v. *Diaz-Carreon*, 915 F.2d 951, 954–955 (5th Cir. 1990) (inconsistent statements are often "the strongest evidence of a criminal defendant's guilty knowledge"; they are so "inherently suspicious" that a "factfinder could reasonably conclude that they mask an underlying consciousness of guilt"). Likewise, Sirena's suspicious departure to Honduras just after the victim died suggests a guilty mind. See p. 23, *supra*. There thus can be little doubt that, had the *Brady* evidence been properly produced, there is a "reasonable probability" that the trial's outcome would have been different. See, *e.g.*, *Kyles*, 514 U.S. at 441–454.

In reaching the opposite result, the Circuit Court disregarded the standards established by this Court. First, the Circuit Court failed to assess materiality in light of the

divided eyewitness testimony at trial, asserting that it was not permitted to "consider or evaluate the weight or credibility of evidence presented to the jury" at the original trial. App., *infra*, 15a. This Court, however, has emphasized that materiality must be determined in light of the weight and quality of evidence presented at trial. See *United States* v. *Agurs*, 427 U.S. 97, 113 (1976) ("[I]f the verdict is * * * of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."). Compounding that error, the Circuit Court did not analyze the potential effect on the jury's verdict; instead, it attempted to reconcile the exculpatory evidence with a guilty verdict. For example, downplaying the significance of the red stains on Sirena's shirt and pants, the court suggested that there was little evidence of blood splatter at the crime scene. But the Circuit Court itself repeatedly indicated that there were photographs suggestive of blood at the scene. See p. 11, *supra*. Moreover, any absence of blood spatter at the scene is consistent with most of the aerating blood having spattered on the assailant's—Sirena's—shirt and pants.

The Circuit Court, moreover, addressed each item of exculpatory evidence individually, failing to consider the cumulative effect of Sirena being found near the scene, the red stains, his false and inconsistent explanations of where he was going, his being seen approaching the victim with a cocked bat, and his departure for Honduras. Under this Court's precedents, materiality must be assessed "in terms of the cumulative effect of [the] suppress[ed]" evidence, "not item by item." *Kyles*, 514 U.S. at 436–437; see *id.* at 440–441. Likewise, the Circuit Court erred by deeming the testimony of petitioner's trial counsel—who indicated only that he was unsure whether the suppressed evidence would have altered the outcome of the trial—"instrumental" to its conclusion that the withheld evidence was not material. App., *infra*, 14a. A court may not substitute the opinion of

trial counsel for analysis of the evidence. And the fact that trial counsel is unsure of the likely impact reinforces the claim of prejudice. The defendant need not show that the exculpatory evidence *would have* changed the verdict. Instead, he need show only that there is a "reasonable probability" of a different result—*i.e.*, a reasonable probability that one juror would have had a reasonable doubt. *Strickler*, 527 U.S. at 289. Here, there is at least a reasonable probability that the exculpatory evidence would have raised a reasonable doubt in the mind of one juror.

B. The Supreme Court of Virginia's *Brady* Ruling Is Not Based On An Adequate And Independent State Ground

Notwithstanding compelling evidence that the wrong person was convicted as a result of patent *Brady* errors, the Supreme Court of Virginia refused to hear this case, stating that "the appeal was not perfected in the manner provided by law * * * because the appellant failed to file the habeas proceeding transcript(s)." App., *infra*, 1a. Ordinarily, the invocation of a state procedural bar will prevent this Court from considering a federal constitutional claim if the procedural rule is "firmly established and regularly followed," *James* v. *Kentucky*, 466 U.S. 341, 348–349 (1984), and is "appl[ied] evenhandedly to all similar claims," *Hathorn* v. *Lovorn*, 457 U.S. 255, 263 (1982). Here, however, the Supreme Court of Virginia's ground of decision does not meet those standards. The court cited no authority to support the assertion that habeas transcripts are necessary to "perfect" an appeal. Nor did it identify any other instance in which such a rule had been applied.

In fact, Virginia law is to the contrary. Under the Virginia rules, transcripts must be filed if they are "*necessary* to permit resolution of appellate issues." Va. S. Ct. R. 5:11(b) (emphasis added). Consistent with that standard, Virginia courts routinely permit review—including review of *Brady* claims—"where the record on

appeal without a transcript or a written statement of facts is sufficient to determine the merits of the appellant's allegations." *Carlton* v. *Paxton*, 415 S.E.2d 600, 603 (Va. Ct. App. 1992); *Wolfe* v. *Commonwealth*, 371 S.E.2d 314, 315–316 (Va. Ct. App. 1988) (same); *Turner* v. *Commonwealth*, 341 S.E.2d 400, 402 (Va. Ct. App. 1986) (same). Indeed, Virginia courts have expressly stated that "nothing in the Rules" makes the filing of a trial transcript mandatory. *Turner*, 341 S.E.2d at 402; see *Wolfe*, 371 S.E.2d at 315 ("[T]he failure to file a [trial] transcript does not remove our jurisdiction.").

Here, the transcripts of petitioner's 1998 criminal trial, the wrongfully withheld *Brady* materials, and the Circuit Court's extensive factual findings in its various opinions were all part of the record. Those items were sufficient under Virginia law, as the Supreme Court of Virginia's own precedents make clear. See *Roe* v. *Roe*, 324 S.E.2d 691, 692 n.1 (Va. 1985) (denying motion to dismiss under court rules despite "fail[ure] to include the [hearing] transcript" because the record "contains a detailed recital of facts found by the court and essential to its decision"); *Salmon* v. *Commonwealth*, 529 S.E.2d 815, 817 (Va. Ct. App. 2000) (holding claim "not barred by the lack of the hearing transcript"); *Goodpasture* v. *Goodpasture*, 371 S.E.2d 845, 846–847 (Va. Ct. App. 1988) (fact that "transcript or written statement of facts was [not] filed" not a bar to appellant's claim where "[a]ll of the facts necessary to decide" the appeal were "sufficiently set forth" in the lower court's opinion). Here, moreover, the grounds for review were all legal in nature—they addressed errors in the Circuit Court's reasoning—making the transcripts irrelevant.

The absence of habeas hearing transcripts relating to materiality, moreover, is not an *independent* state ground. As a matter of federal law, materiality is "assessed in light of the evidence adduced against the defendant *at trial*." *Leka* v. *Portuondo*, 257 F.3d 89, 104 (2d Cir. 2001)

(emphasis added); see *United States* v. *Ellis*, 121 F.3d 908, 918 (4th Cir. 1997) (materiality is determined in light of "the whole case, taking into account the effect that the suppressed evidence, had it been disclosed, would have had on the evidence considered *at trial*.") (emphasis added). This Court and others routinely resolve *Brady* claims without hearings on the issue of materiality, by comparing the strength and nature of the evidence introduced at trial to the suppressed evidence. See, *e.g.*, *Strickler*, 527 U.S. at 290–296 (assessing materiality based on comparison between the trial record and suppressed evidence); *Kyles*, 514 U.S. at 441–454 (examining suppressed evidence in light of testimony and evidence introduced at trial to determine materiality). Here, the Supreme Court of Virginia offered no reason for concluding the transcripts were necessary to resolve the federal question of whether the Circuit Court's materiality analysis was consistent with *Brady*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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